Bench:
Mr. Justice Bhishmadev Chakrabortty
And
Mr. Justice A.K.M. Zahirul Huq

First Appeal No. 36 of 1978

Aminullah being dead his heirs-
1(a) Abdul Khaleque Sowdagar and others
..... appellants

-Versus-

Aminul Islam being dead his-
1(a) Ambia Khatun and others
..... respondents

Mr. Md. Zahirul Islam, Advocate
..... for the appellant

No one appears for the respondents

Judgment on 13.07.2025

Bhishmadev Chakrabortty, J:

Defendant 1 has preferred this appeal challenging the judgment and decree of the then Subordinate Judge, Court 1, Chattogram passed on 09.11.1977 in Partition Suit 50 of 1977 decreeing the suit for partition in preliminary form.

The plaint case, in brief, is that the suit property as described in the schedules to the plaint originally belonged to Makbul Ali. During his possession and enjoyment he died leaving behind 2 sons Naju Miah and Lal Miah and 3 daughters Amena, Maimuna and Sonai. Naju died leaving behind his son Gunsu Miah and daughter Laduni. Lal Miah died leaving behind 2 daughters Fulsona and Golsafa and above 3 sisters and the brother. Out of the aforesaid 2 brothers Lal Miah died first.

Maimuna died leaving behind his son Pachu Miah and daughter Shohagi Khatun. Sonai died leaving behind 5 sons Abdus Sobhan, Mafzal Ahmed, Nazir Ahmed, Zakir Ahmed and Ahmed Rahman and 2 daughters Meher Khatun and Amena Khatun. Amena Khatun the daughter of Sonai sold her share to defendant 2 Gunsu. Laduni defendant 3 sold her share to defendant 10 Imam Sharif. The plaintiff purchased 5 *gondas* of land from defendant 10 through a registered *kabala;* 7 *gondas* from Abdul Sobhan and Meher Khatun and Amena Khatun through another *kabala* dated 06.07.1973; 7 *gondas* from Mafzal Ahmed and Najir Ali who were the sons of Sonai through 2 separate *kabalas* both dated 09.07.1973; 6 *gondas* 3 *koras* and 2 *karantis* share from Sagir Ahmed and Ahamadur Rahman the son of Sonai through *kabala* dated 05.07.1973. The plaintiff has been possessing land in *ejmali* less than his purchased land. He requested the defendants to partition the suit land but the defendants refused to do so, hence the suit for partition of the suit land claiming his *saham* to the extent of 1 *kani* and 4.5 *gondas* equivalent to .49 acres.

Defendant 1 contested the suit by filing a set of written statement denying the statements made in the plaint. There he further contended that the suit *jote* originally belonged to Makbul Ali, Shaer Bibi, Nazrul and Lal Miah. Makbul Ali had other brothers. The suit property was not partitioned among the brothers

of Makbul Ali. Makbul died leaving behind 2 sons Naju and Lal Miah and a widow Shaer Bibi and 2 daughters Amena and Maimuna. He had no daughter namely Sonai. Shaer Bibi died leaving behind his son and daughter. Naju subsequently died leaving behind his daughters Siraji Khaun, Laduni and son Gunsu Miah and widow Altuni Khatun. Siraji died leaving behind a son and husband. Maimuna died leaving behind his son Pachu Miah and daughter Shohagi Khatun. Subsequently, Lal Miah died leaving behind his daughter Fulsona. Defendant 1 purchased 1 *kani* 9 *gondas* share from Amena thorough a *kabala*. Before registration of the *kabala* one *bainapatra* was executed and possession was delivered to him on payment of consideration money. He also purchased some land from Fulsona through a *kabala.* Before execution of the *kabala* bainapatra was executed and possession of the land was delivered to him. He further purchased 5 *kani,* 19 *gondas* of land by 3 *kabalas* from Amena and Fulsona. He purchased 3 *gondas* from Laduni. Gonsu Miah filed a criminal case against defendant 1 but in that case he did not claim any land purchased from defendant 1. Plaintiff did not get possession in his purchased share from the heirs of Sonai. Amena is in possession of some land which she got by way of inheritance. Defendant 1 is in possession of 6 *kani* and 2 *gondas* land through purchase as mentioned above. Finally, he prayed for dismissal of

the suit or in the alternative claimed *saham* to the extent of 6 *kani* and 2 *gondas* measuring 1.98 acres.

Defendants 2, 3 and 9 contested the suit by filing written statement denying the statements made in the plaint but finally defendant 2 claimed 12 *gondas* and 3 *karas* share, defendant 3 claimed 9 *gondas* and 3 *karas* and defendant 9 claimed 1 *kani* 4 *gondas* and 2 *karas* share in the suit land.

Defendants 4-7 filed written statement and contested the suit and claimed share of 4 *kanis* and 5 *gondas* by way of purchase. Defendant 8 submitted written statement and claimed share of 6 *gondas* in the suit schedule through purchase while defendant 10 contested the suit and claimed *saham* of 5 *gondas* through purchase.

On pleadings, the trial Court framed the following issues-

i) Is the suit bad for defect of parties?

ii) If all the joint land have been brought into hotchpotch?

iii) If Makbul had any daughter Sonai by name?

iv) Whether the genealogy given by the plaintiff is correct? If Lal Miah died earlier than Naju Miah?

v) Whether Lal Miah had any daughter Gulsafa by name?

vi) If the plaintiff is entitled to partition on declaration of his title in the suit property?

vii) Whether the defendants 2-10 are entitled to their respective *sahams* as prayed for?

viii) To what relief is the plaintiff entitled to?

In the trial the plaintiffs examined 5 witnesses and their documents were exhibits-1-4(J). Defendant 1 examined 4 witnesses DWs 2, 9, 10 and 11 and their documents were exhibits-A-A3, B-B2, D-D 22. Defendants 2, 3 and 9 examined 3 witnesses DWs 4, 5 and 6 and their documents were exhibits-AI - BI. Defendants 4-7 examined 2 witnesses DWs 1 and 3 and their documents were exhibits-AII - BII(2). Defendants 8 and 10 examined 2 witnesses DWs 7 and 8 and then documents were exhibits-III and III (i). However, the then Subordinate Judge by the judgment and decree under challenge decreed the suit giving *saham* to the plaintiff to the extent of 1 *kani and* 2.5 *gondas* share while defendant 1 was given 3 *gondas*. The trial Court further allocated share to defendants-2(a) – 2(d) of 12 *gondas and* 3 *karas*; defendants 3 for 9 *gondas and* 3 *karas;* defendants 4-7 for 4 *kanis* and 17.5 *gondas;* defendant 8 for 3 *gondas;* defendants 9 for 2 *gondas* and defendant 10 for 5 *gondas*. Being aggrieved by the aforesaid judgment, defendant 1 has preferred this appeal.

Mr. Md. Zahirul Islam, learned Advocate for the appellants taking us through the materials on record very candidly submits that the findings of the trial Court that Makbul had a daughter named Sonai and Lal Miah had a daughter Gulsafa are correct and he will not make any argument on those issues. Mr. Islam advanced his argument mainly on 3 points. Firstly he submits that the trial Court did not at all take into consideration 3 *bainapatras* of defendant 1 exhibits-B, B1 and B2 through which he got land of the suit schedule. If the *bainapatras* were taken into consideration by the trial Court the share of this defendant would have been 88.65 decimals and share of the plaintiff would reduced to 32.21 decimals. He refers to some cases of our apex Court to substantiate his submission claiming land on the basis of unregistered *bainapatra* [Reliance placed on 44 DLR (AD) 176 and 16 BLC 639]. Mr. Islam secondly submits that the trial Court failed to consider the fact and oral evidence of the parties that Nazu Miah had another daughter Siraji Khatun who died before the death of her father. Nazu Miah died on 12.12.1961 and Muslim Family Laws Ordinance, 1961 (Ordinance, 1961) came into force before his death. Therefore, Siraji's son and heirs are to be considered as co-sharer in the suit schedule as heirs of Naju and they are entitled to its share. Without impleading the heirs of Siraji Khatun, the suit was bad for defect of parties. In the third

and last fold of argument Mr. Islam submits that defendant 1 purchased land from Fulsona, Amena and Laduni through exhibits-A-A3 but the trial Court held that the vendors Amena and Fulsona sold their entire shares to other defendants and they had no land to sell it to this defendant. If the trial Court scrutinized the schedule of the *kabalas* through which the plaintiff purchased land from Amena and Fulsona with the *kabalas* of defendant 1 purchased from same vendors the decision passed allocating less *saham* to this appellant could have been otherwise and he would get 54 decimals of land in the suit schedule even his claim on the basis of unregistered *bainapatra* was overlooked. Mr. Islam finally prays for allowing the appeal allocating *saham* to the appellants in the suit land as prayed for or sending the suit on remand to consider aforesaid claims of the appellants afresh.

No one appears for the respondents, although the matter has been appearing in the daily cause list with the name of the learned Advocate for the respondents from 24.04.2025. It is found in the order book that this matter was heard at length in another bench of this division and was fixed for delivery of judgment on 20.11.2024. Learned Advocate for respondent 1 appeared and on his prayer the matter was withdrawn from the column of delivery of the judgment and it was posted in the list for hearing. Thereafter, the matter was adjourned for several occasions in

presence of the learned Advocate for respondent 1. After fixing the matter in this Bench, the learned Advocate for the appellants was heard on so many days and it was kept in the list for hearing the learned Advocate for the respondent but none turned up. Today the matter is appearing in the cause list for delivery of the judgment. The learned Advocate for respondent 1 prays for adjournment on the ground that respondent 1 in the meantime died and his heirs are not substituted. On perusal of the order book and memorandum of appeal, it is found that the heirs of respondent have been substituted long ago and notices were served upon them duly. Therefore, the matter is taken up for delivery of judgment in the absence of respondents.

We have considered the submissions of the learned Advocate for the appellants and gone through the impugned judgment and other materials on record.

This is a suit for partition where sole plaintiff claimed *saham* in the suit land for 49 decimals but the trial Court allocated him *saham* of 45 decimals. Defendant 1, predecessor of the appellants prayed for dismissed of the suit and in the alternative claimed *saham* for 198 decimals but he has given *saham* of 6 decimals and being aggrieved by he preferred this appeal. The appellants' father claimed *saham* thorough 3 unregistered *bainapatra* exhibits-B, B1 and B2 and by way of purchase. We

have gone through those agreement for purchase and *ratio* of the cases cited by the learned Advocate for the appellants. The *ratio* laid in the cases as referred to by him do not match this case. We have gone through the findings of the trial Court on the claim of defendant 1 on those *bainaptaras* and find that the trial Court rightly disbelived those and rejected his claim through those. Therefore, the submissions made by the learned Advocate for the appellants claiming land through exhibits-B, B1 and B2 bears no substance. But it appears that in the written statement that defendant 1 claimed- "Naju Miah died leaving one son, defendant No.2 and 2 daughters defendant No.3 and Siraji Khatun and a wife. The said Siraji Khatun died leaving behind a son and a husband as heirs." The plaintiff in their plaint although did not admit Siraji Khatun as daughter of Nazu Miah but PW4 Khalilur Rahman in evidence stated, "Then Nazu died leaving behind daughter Laduni (defendant No.3) and son Gunsu Meah (defendant No.2). Another daughter Siraji Khatun died during lifetime of Nazu." He stated in cross-examination, "I know Ahamadur Rahman husband of Siraji Khatun. Abul Khair son of Siraji Khatun is 25/30 years old." However, he denied that Siraji Khatun died after the death of his father. DW 4 Gonsu Miah stated in evidence, "I do not remember how many years ago Siraji Khatun died. Not a fact that Siraji Khatun died after Naju Meah."

DW 10 Saleh Ahmed stated in evidence, “Siraji Khatun died leaving son Abul Khair.” From the above oral evidence of witnesses and the statements made by defendant 1 in his written statement it has been proved that Naju Miah had another daughter named Siraji Khatun and she died before the death of his father leaving behind his son Abul Khair and husband Ahamadur Rahman. Now the question comes whether Siraji Khatun died before the death of his father. It has been proved in evidence that Siraji Khatun died before the death of his father Naju Miah. It appears from the death register of Naju Miah exhibit-BII that he died on 12.12.1961, *i.e.,* after the Ordinance, 1961 came into force. The aforesaid Ordinance, 1961 came into force on 02.03.1961 and Naju Miah died on 12.12.1961. As per the provisions of the Ordinance, 1961 deceased Siraji’s son and husband would inherit share of the property of Naju Miah which Siraji Khatun was entitled to, if she had been alive at the time of her father’s death. Therefore, it is found that the suit is hopelessly bad for defect of parties for not impleading the heirs of Siraji Khatun in the suit who had community interest in the suit land. If they were added as defendants they would have surely claimed their share as heirs of Siraji which might have been more or less 22 decimals. If the aforesaid facts were considered by the trial Court the whole allocation of share would have been otherwise.

It is further found that defendant 1 claimed share in the suit land measuring 6 *kanis* 2 *gondas* through four *kabalas* from Amena, Fulsona and Laduni mentioned in the written statement. Defendant 1 produced 4 *kabalas* exhibits-A-A3 and led oral evidence in support of those. The above *kabalas* were exhibited without any objection. The trial Court allocated *saham* to defendant 1 only on the *kabala* exhibit-A2 through which he purchased land from Laduni. But did not allocate share on the lands of deeds purchased from Amena and Fulsona holding that Amena and Fulsona exhausted their share by selling it to others earlier and disbelieved the evidence of DW2 Amena Khatun only on the ground of having interest with defendant 1. The trial Court without scrutinizing the deeds of the alleged previous transfers by Amena and Fulsona to defendants 2 and 3 simply rejected the claim of defendant 1 through purchase from Amena and Fulsona exhibits-A, A1 and A3. The aforesaid decision appears not well founded by reasoning. In rejecting the claim of defendant 1 through purchase deeds from Amena and Fulsona, the trial Court ought to have scrutinized the dates of execution and registration of the deeds and schedules of those and give specific findings how Amena and Fulsona exhausted their right in the suit land before transferring the land to defendant 1. If the aforesaid deeds and fact

would have been considered by the trial Court the share of defendant 1 would have been more or less .54 acres.

It is found that although the trial Court allocated share to defendants 2, 3 and 9, defendants 4 and 5, defendants 8, 9 and 10 but none of them including the plaintiffs appeared in the appeal to contest it. It will be very risky for us to allocate *saham* in the modified form to the appellants, heirs of defendant 1 as claimed by Mr. Islam. If the heirs of Siraji Khatun get share in the suit land, the whole allocation of share by the trial Court would be changed. Therefore, we find that justice would be best served, if the suit is sent on remand to the trial Court for trial afresh only on two points (i) for adding the heirs of Siraji Khatun as defendants in the suit and (ii) for consideration of share of defendant 1 (appellants herein) by way of purchase deeds from Amena and Fulsona through exhibits-A, A1 and A3. In doing so the trial Court will be at liberty to examine the other *kabalas* submitted before it through which Amena and Fulsona allegedly exhausted their share in the suit land before selling it to defendant 1. In disposing the suit as aforesaid, the parties will be at liberty to amend the pleadings and examine witnesses, if required.

In view of the discussion made hereinabove, we find substance in the submissions of the learned Advocate for the appellants on the second two folds. Accordingly, the appeal is

allowed. No order as to costs. The judgment and decree passed by the trial Court is hereby set aside.

The suit is sent on remand to the trial Court to dispose of it on merit in the light of the findings, observation and direction given in the body of the judgment. However, the trial Court shall dispose of the suit expeditiously.

Communicate this judgment and send down the lower Court records.

A.K.M. Zahirul Huq, J.

I agree.

***Sumon-B.O.***